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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 607

ROBERT S. BECKER, PETITIONER

v.

MAJOR GENERAL ROBERT M. WEBSTER, COMMANDING OFFICER AT FORT SLOCUM, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 17–24) is not reported. The majority (R. 31–37) and dissenting (R. 37–42a) opinions in the Court of Appeals are reported at 171 F. 2d 762.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1949 (R. 43). The petition for a writ of certiorari was filed on February 28, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. In the course of a pretrial investigation of charges against petitioner, a United States Army officer in occupied Germany, a German witness was unwilling to testify in the presence of the accused officer and his counsel. Thereafter, the investigating officer, over the objection of the accused, obtained a statement from the witness without the presence of the accused and his counsel. The investigating officer then made available to the accused the statement thus obtained, and offered to produce the witness for cross-examination. This offer was declined. The question is whether, under these circumstances, petitioner was deprived of the right under Article of War 70 to cross-examine available witnesses against him during the pretrial investigation of charges.

2. Whether compliance with AW 70 is a condition precedent to the jurisdiction of an Army general court-martial.

STATUTE AND REGULATION INVOLVED

The second paragraph of the 70th Article of War (10 U. S. C. 1542) provided at all times relevant hereto as follows: [1]

[1] Effective as of February 1, 1949, this paragraph has, without pertinent amendment, been transferred from AW 70 to a new location in the Articles of War. It is now AW 46b. Act of June 24, 1948, c. 625 (Public Law 759, 80th Cong.), Title II, §§ 222, 231, 244. Since the paragraph is referred to throughout the record as being part of AW 70, we shall continue thus to refer to it herein.

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Paragraph 35*a* of *Manual for Courts-Martial,* 1928 ed.,[2] provided in pertinent part as follows:

> 35. COURTS-MARTIAL—PROCEDURE BEFORE TRIAL.—Submission of and Action Upon Charges—Investigation of charges; reference to staff judge advocate; suspected insanity.
>
> *a. Investigation of Charges—Statutory requirements; introductory statement.*—No charge will be referred [to a general court-martial] for trial until after a thorough and impartial investigation thereof shall have

[2] The 1949 edition of the *Manual* contains no relevant changes.

been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. * * * (A. W. 70.)

* * * * *

What follows in this paragraph (35*a*) is primarily intended to indicate a proper procedure in the more usual cases. Variations to save labor, time, or expense, or designed to meet other cases, or exceptional or local conditions, or for any other good reason, are not only permissible but should be adopted, provided the spirit and purpose of the statutory requirements quoted above are carried out. * * *

Instructions.— * * *

All available witnesses who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused. * * *

Where the investigating officer makes known to the accused the substance of the testimony expected from a witness as ascertained by written statement of the

witness, interview with the witness, or other similar means, and the accused states that he does not desire to cross-examine such witness, the witness need not be called even if available. * * *

STATEMENT

On March 12, 1948, petitioner, a first lieutenant in the United States Army stationed in the American Zone of occupied Germany, was convicted in Germany by an Army general court-martial on three charges and ten specifications of conduct unbecoming an officer and a gentleman and to the prejudice of good order and military discipline,[3] in violation of the 95th and 96th Articles of War, 10 U. S. C. 1567, 1568 (CM R. 276, 289–294, 518).[4] He was sentenced to dismissal from the service, total forfeitures, and three years' confinement at hard labor (CM R. 519). The record of trial was thereafter reviewed and approved by the Staff Judge Advocate (CM R. 6–25) and the Office of the Judge Advocate General (CM R. 4–5; see CM 330265, *Becker,* 78 B. R. 329). On or about May

[3] Generally stated, the offenses charged consisted of selling whiskey to enlisted men, engaging in the business of buying and selling whiskey, making false official statements, and causing various official orders and certificates to be falsely made (CM R. 20–23, 289–294).

[4] "CM R." refers herein to petitioner's court-martial record, which was admitted in evidence at the habeas corpus proceeding pursuant to stipulation (R. 16). Page references to this record are to the pencilled numbering at the lower right-hand corner of each page. Photostatic copies of the court-martial record have been filed with the Clerk of this Court.

29, 1948, the Secretary of the Army reduced the period of confinement to 18 months and confirmed the sentence as thus modified (R. 6, 13, 18).[5]

On June 9, 1948, petitioner filed in the District Court for the Southern District of New York a petition for a writ of habeas corpus (R. 5–11), which gave rise to the present proceeding. The petition, so far as is now pertinent, challenged the jurisdiction of the court-martial on the ground that the second paragraph of the 70th Article of War (*supra*, p. 3), providing that "No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. * * *," and particularly that portion of the paragraph stating that "At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available * * *," had not been complied with (R. 6–7). The writ issued (R. 3–4) and a return, denying the pertinent allegations of the petition, was filed (R. 12–15). By stipulation (R. 16), it was agreed that the petition for the writ, the writ, the return to the writ, and the

[5] Petitioner's 18-month sentence will thus expire on September 11, 1949. We are advised by the Department of the Army, however, that assuming full credit for good conduct (see 10 U. S. C. 1455), petitioner will be released from custody on May 11, 1949. Petitioner indicates (Pet. 11–12) that, as of the date of filing of the petition for certiorari, he has forfeited no good-conduct credits.

court-martial record should constitute the entire record in the habeas corpus proceeding.

On November 4, 1948, the District Court (Bondy, D. J.) entered an order discharging the writ and remanding petitioner to custody (R. 25). In an accompanying opinion (R. 17–24), the court held that AW 70 had been fully complied with (R. 18–22, 24) and that in any event compliance with the Article does not condition the jurisdiction of a court-martial (R. 22–24). On appeal, the Court of Appeals for the Second Circuit, one judge dissenting (R. 37–42a), affirmed the order of the District Court (R. 43). The Court of Appeals assumed, *arguendo,* that compliance with AW 70 is a jurisdictional prerequisite to a valid trial and conviction by general court-martial (R. 33a–34), but held that there had been full and literal compliance in this case (R. 32–33a, 34–37).

The relevant facts may be summarized as follows:

The charges, as originally preferred on November 12, 1947 (CM R. 36), consisted of four charges, embracing 42 specifications (CM R. 27–33). Major Hugh Adcock was detailed to investigate these charges in accordance with AW 70, and he did so, the investigation lasting about one month and involving the interrogation of approximately 26 witnesses (CM R. 302–303). Among the witnesses interrogated was one Ilse Dieringer, also known

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as "Susie," a German civilian who had done secretarial work for petitioner during the period of the alleged offenses (CM R. 300, 388). Adcock conducted the interrogation of Miss Dieringer in the presence of petitioner and his counsel (CM R. 300). She answered some of Adcock's questions, but made no response to many of them, particularly those relating to her associations with petitioner (CM R. 225–237, 300).

On December 16, 1947, Adcock submitted his report as pretrial investigating officer (CM R. 65–258), recommending that petitioner be tried by general court-martial on certain of the charges and specifications, but that others be dropped (CM R. 66, 68–72). In his "Summary of Ilse Dieringer's Statement" (CM R. 95), which was one of numerous exhibits to Adcock's report, he stated that "Ilse Dieringer is an extremely nervous girl who is very high strung. During the course of this investigation, while she was being questioned by the undersigned, she, at times, became so nervous or frightened that she was unable to even talk. * * * Due to the fact that Ilse Dieringer is of such a nature and so easily frightened it is doubted by the undersigned that she will be of any usefulness as a witness in a court-martial."

Pursuant to the recommendation of Adcock, all but ten of the specifications, embraced in two charges, were stricken, but an "Additional Charge" and two specifications thereunder were

added (CM R. 27–35). The additional charge and specifications were likewise referred to Major Adcock for pretrial investigation pursuant to AW 70 (CM R. 61). On February 5, 1948,[6] Adcock submitted a second report (CM R. 39–60) recommending trial by general court-martial of the additional charge and specifications as well (CM R. 40). Among the five witnesses whom Adcock interrogated during this second investigation was Ilse Dieringer (CM R. 39). Adcock stated in his report that he had "received information that Ilse Dieringer desired to be questioned without [petitioner] being present. This was done, and Exhibit 3 attached is the testimony that she gave. As indicated in Exhibit 1 attached hereto, this testimony was made available to the accused and he was informed of his right to cross-examine the witness on her testimony. This he declined to do. Exhibit 1 is a verbatim record of the exchange between the investigating officer and counsel for the defense on this matter" (CM R. 40).

As indicated in the above-quoted statement in Adcock's second report, Exhibit 3 (CM R. 45–51) to the report was the transcript of Miss Dieringer's testimony under oath to Adcock as given in his second interview with her. In this second examination Miss Dieringer gave testimony incriminating petitioner (CM R. 45–47,

[6] The report bears the date February 5, 1947 (CM R. 39), but this is an obvious error.

50). She was asked why she had not told all she knew in her first examination, and she explained that "it is kind of hard for a German girl to testify against an American officer who's never done anything to her," and that she feared she would lose her job if she got anyone "in trouble" (CM R. 49). The last part of her examination was as follows (CM R. 51):

> Q. What did you want to talk to me about?
>
> A. About what worries me the worst is the first time I told you such a big lie, that's when I said I couldn't remember so the whole story would be over. Maybe it was foolish of me, I don't know, but I worried for days and nights.
>
> Q. What made you decide to tell me the truth, Susie?
>
> A. Now?
>
> Q. What made you decide to tell the truth now and why didn't you tell me the truth the first time I talked to you?
>
> A. Because I thought I wouldn't have to go to court-martial and wouldn't have to testify against any American. Maybe you don't see the way I feel, its hard to make myself understood.
>
> Q. I think I know how you feel, Susie. I don't have any more questions, is there anything further you would like to say, Susie?
>
> A. Maybe you don't believe me any more because I didn't tell the truth in the first place but today I told you really what I

> know about it, everything I can remember so far. If you want to ask me again in front of Lt. Becker, its OK. I see that I must have been—I don't know what it was.

Exhibit 1 (CM R. 41) to Adcock's second report explained that counsel for petitioner, prior to the second examination of Miss Dieringer, objected to Adcock's examining this witness outside the presence of petitioner; that Adcock, following the examination, showed petitioner's counsel the statement given by Miss Dieringer and offered to recall her for cross-examination by petitioner and his counsel on the statement; and that counsel declined the offer on the ground that cross-examination would be "fruitless and useless" in view of the fact that petitioner had not been permitted to be present at the direct examination.

Petitioner's objections to Adcock's examining Miss Dieringer in his absence were renewed at the court-martial trial in a "plea in bar of trial," and the plea was overruled (CM R. 297–313). Adcock testified at the hearing on the plea that prior to his second examination of Miss Dieringer he (CM R. 303)—

> * * * called the PX manager of the 831st Engineers [where Miss Dieringer worked] and talked to him and told him that in a few days I would call Susie again for interrogation and asked him if he couldn't put her at her ease so that she would be able to talk sensibly or put

her at her ease when I questioned her * * *.

Adcock further testified that he presented Miss Dieringer's second statement to the accused and his counsel; that he told them "she was available for cross-examination" and "was willing to be cross-examined" and to repeat her statements in petitioner's presence; but that petitioner's counsel declined the offer (CM R. 304). It should be noted that at the court-martial trial, Miss Dieringer was called as a witness by the prosecution and was cross-examined by the defense (CM R. 387, 392).

ARGUMENT

1. In *Humphrey* v. *Smith,* pending on writ of certiorari as No. 457, we have argued (pp. 50–81) that compliance with AW 70 is not a jurisdictional prerequisite to a valid trial and conviction by general court-martial, so that even substantial failure to comply with its requirements, absent a showing of fundamental and vitiating unfairness, does not constitute jurisdictional error cognizable on habeas corpus. For the purposes of the first question presented here, however, it will be assumed, *arguendo,* that substantial compliance with AW 70 does condition the jurisdiction of the court-martial. We submit that here, as both courts below found, there was full and literal compliance with the pre-trial investigation requirement of the Article.

The essence of petitioner's objection to the manner in which Major Adcock conducted the pretrial investigation is the fact that, after having elicited little or nothing of value from his initial examination of the witness Miss Dieringer, conducted in the presence of petitioner and his counsel, he thereafter examined her a second time in their absence, in connection with the additional charge and specifications, and elicited from her important statements incriminating petitioner. Miss Dieringer was, however, only one of more than a score of witnesses interrogated by Adcock over a period of more than a month. It is undisputed, moreover, that Adcock offered petitioner and his counsel the transcript of the testimony given by Miss Dieringer in his second examination of her, and further offered to recall her and permit them to cross-examine her on her statements. He also advised them that Miss Deiringer was then willing to repeat her statements in the presence of petitioner. This constituted full and literal compliance with AW 70. AW 70 does not require the investigating officer to conduct his direct examination of witnesses against the accused in the latter's presence; it simply provides that the accused shall be given the opportunity "to cross-examine witnesses against him if they are available," and this was done.

Judge Frank, dissenting below, did not base his dissent on a belief that AW 70 was not complied

with, but on the ground that paragraph 35*a* of *Manual for Courts-Martial* (*supra*, pp. 3–5) was not satisfied (R. 38). He pointed out that paragraph 35*a* of the *Manual* goes further than AW 70, on which it is based, by requiring that "All available witnesses who appear to be reasonably necessary for a thorough and impartial investigation will be called and examined in the presence of the accused." This, he said, is "a positive legal requirement, fully as obligatory as if it were in the statute" (R. 38). Petitioner, similarly, recognizes the infirmity of his argument in so far as it is based solely on the statute itself, and relies primarily on the quoted sentence of the *Manual* (Pet. 2–3, 20, 22).

But the quoted sentence of the *Manual* may not be read in isolation. It must be read in the context in which it appears. The *Manual* also provides that "What follows in this paragraph (35*a*) [including the sentence relied on by petitioner and Judge Frank] is primarily intended to indicate a proper procedure in the more usual cases. Variations to save labor, time, or expense, or designed to meet other cases, or exceptional or local conditions, or for any other good reason, are not only permissible but should be adopted, provided the spirit and purpose of the statutory requirements quoted above are carried out."

The present case presents a good illustration of a variation "designed to meet * * * exceptional or local conditions, or for any other

good reason." Ilse Dieringer was a young German civilian woman employed by our occupation forces. She was loath to testify against an American officer in a matter in which she had no personal concern. Though she knew a great deal about the matters under investigation by Major Adcock, she was too "nervous" and "frightened" in petitioner's presence to give a coherent account of his activities in connection therewith. Her reluctance to testify to anything that might incriminate petitioner was based in part upon a fear that she might lose a job which she valued highly if she got an American officer "in trouble." Perhaps even more significant would be the fear, presumably unjustified but instinctive with the conquered when dealing with their conquerors, of reprisals if she testified against an officer of the occupying forces. In any event, as Adcock stated in his initial report, her testimony, given in petitioner's presence, shed little light on the matters under investigation. Miss Dieringer later, however, realizing she had been wrong in failing to tell all she knew, requested leave to tell what she knew to Adcock privately. She did so, and at the close of the second interview told him that she was then willing to repeat her story in petitioner's presence. Adcock then offered petitioner and his counsel a copy of her statements made at the second interview, advised them of Miss Dieringer's willingness to repeat her story with petitioner present, and offered to recall her

for that purpose and to afford them an opportunity to cross-examine her.

Petitioner and his counsel were thus afforded the opportunity to cross-examine which AW 70 guarantees. They had no right to decline this opportunity on the ground assigned. The fact that Adcock conducted his second interview with Miss Dieringer in petitioner's absence before offering to permit petitioner and his counsel to cross-examine her was entirely justified in view of the peculiar circumstances of the case, and consequently violated neither the letter nor the spirit of paragraph 35*a* of the *Manual*.[7] Indeed, para-

[7] According to Judge Frank (footnote 2a, R. 42–42a), our contention that Major Adcock was justified, under the special circumstances here present, in interrogating Miss Dieringer in petitioner's absence before offering her to petitioner for cross-examination would "destroy the reason for the requirement" (of paragraph 35*a* of the *Manual*) that witnesses be called and examined in the presence of the accused. He apparently assumes that one of the purposes of the requirement of paragraph 35*a*—that witnesses at the pretrial investigation be called and examined in the presence of the accused—is to enable the accused to take advantage of a situation in which his presence "might deter [the] witness from testifying" (*ibid.*). Judge Frank does not elaborate on this somewhat cryptic statement. We submit, however, that the true reason why, in the ordinary case contemplated by the *Manual*, the entire examination of each witness should be conducted in the accused's presence—*i. e.*, why there should be confrontation on direct as well as the right to cross-examine—is to deter the witness from testifying *falsely* against the accused. The purpose of cross-examination is likewise to enable the accused to probe for falsehoods in the witness' testimony. But where, as in this case, it becomes evident to the pretrial investigating officer that the accused's presence

graph 35*a* recognizes the propriety of Adcock's course of action not only implicitly, for the reasons we have stated, but expressly as well. It states that "Where the investigating officer makes known to the accused the substance of the testimony expected from a witness as ascertained by written statement of the witness, interview with the witness, or other similar means, and the accused states that he does not desire to cross-examine such witness, the witness need not be called even if available."

It is evident, we think, that what petitioner has insisted upon from the beginning has been, not the right of cross-examination of a witness against him, which AW 70 guarantees, but an assumed "right" to try to prevent a witness from talking at all by the use of undue influence over her, acquired in consequence of a position of authority which he once held over her and which engendered in her fear and reluctance to testify against him. Neither AW 70 nor the *Manual* confers any such "right." The situation, with respect to Miss Dieringer, which confronted the investigating officer

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tends to obstruct the elicitation of *truthful* testimony from a witness—in consequence of undue though understandable reluctance on the part of the witness truthfully to incriminate the accused in his presence—the investigating officer is justified, for the reasons stated in the text, in concluding that the special circumstances present warrant a departure from the normal procedure to the extent of first permitting the witness to tell her story in private and thereafter offering her to the accused for cross-examination.

in his attempt to probe into the facts surrounding petitioner's activities, presented a real problem. The other witnesses against petitioner, mostly American military personnel (see CM R. 73–74), were not afraid to speak out against petitioner in his presence. Miss Dieringer, a German civilian, on the other hand, had at first an entirely understandable reluctance and fear to say anything incriminating against petitioner, her erstwhile American superior, in his presence. Adcock handled the delicate situation properly. He violated no rights of petitioner.

The lack of substance in petitioner's complaint is illustrated by the fact that in many cases the witnesses are interviewed by investigators prior to the filing of charges and the appointment of the AW 70 investigating officer, with the result that in such cases the initial direct examination of such witnesses is had outside the presence of the accused. Further, in view of the universal practice in civilian criminal law of interviewing witnesses outside the presence of the accused, it cannot be presumed that either Congress or the President ever intended to provide that the AW 70 investigating officer should never interview any witness except in the presence of the accused. At any rate, the Judge Advocate General has consistently ruled to the contrary without objection from Congress or the President. CM 185756 (1929) Dig. Ops. J. A. G., 1912–1940, sec. 428 (3),

p. 293; *Wyatt,* 15 B. R. 217, 225 (1943); *Greer,* 23 B. R. 231, 248 (1943).

2. We also contend that compliance with AW 70 is not a condition precedent to the jurisdiction of an Army general court-martial. For our reasons in support of this position, we refer to our brief on the merits in *Humphrey* v. *Smith,* No. 457, pp. 50–81 now pending before the Court.

CONCLUSION

The judgment below is correct and no conflict of decisions or any question requiring further review by this Court is presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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